Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CARLOS ANTONIO DUQUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SEAN HOLAHAN BRUNER
BRUNER & BOWMAN, P.C.
78 West Cushing Street
Tucson, Arizona 85701
(520) 624-8000
(520) 622-1094 Fax
Arizona State Bar No. 007296
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTIONS PRESENTED FOR REVIEW

I. If the government chooses to obtain a superseding indictment without dismissing the original indictment does the government receive an extension of the deadline within which it must bring the case to trial under the Speedy Trial Act?

II. If the government chooses to dismiss an indictment and file a new indictment in a different district can the government successfully argue that the case was "transferred" under the Speedy Trial Act and Rules of Criminal Procedure?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction..... 1

Statutory Provisions Involved..... 1

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 11

Appendix – Published Opinion of the Panel of the Ninth Circuit Court of Appeals.....App. 1

TABLE OF AUTHORITIES

Page

CASES:

United States v. Baker, 40 F.3d 154 (7th Cir. 1994) 8

United States v. Duque, 62 F.3d 1146 (9th Cir. 1995) 1

United States v. Gambino, 49 F.3d 353 (2d Cir. 1995) 8

United States v. Gonzalez, 897 F.2d 1312 (5th Cir. 1990) 9

United States v. Long, 900 F.2d 1270 (8th Cir. 1990) 8

United States v. Palomba, 32 F.2d 1456 (9th Cir. 1995) 8

United States v. Rojas-Contreras, 474 U.S. 231 (1985) ..8, 10

STATUTES:

18 U.S.C. §3161(c)(1) 5

18 U.S.C. §3161(d)(1) 2, 7

18 U.S.C. §3161(h)(1)(G) 2, 10

18 U.S.C. §3161(h)(1)(H) 2, 5, 6, 10

18 U.S.C. §3161(h)(6).....1, 7

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 21.....3, 4, 7, 10

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit at issue is reported as *United States v. Carlos Antonio Duque*, 62 F.3d 1146 (9th Cir. 1995). A copy of the opinion accompanies this petition as Appendix (App.) "A".

STATEMENT OF JURISDICTION

The challenged decision of the court of appeals was entered on August 7, 1995. A petition for rehearing and suggestion for rehearing en banc was denied on March 11, 1996. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

ISSUE I

Title 18, United States Code, Section 3161(h)(6) provides:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * *

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with

that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

Title 18, United States Code, Section 3161(d)(1) provides:

If any indictment or information is dismissed upon motion of the defendant . . . and thereafter a complaint . . . or indictment is filed charging such defendant with the same offense or an offense based on the same conduct . . . [the Speedy Trial Act clock begins to run anew].

ISSUE II

Title 18, United States Code, Section 3161(h)(1)(G)(H) provides:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * *

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –

* * *

(G) delay resulting from any proceeding relating to the transfer of a case . . . under the Federal Rules of Criminal Procedure;

(H) delay resulting from the transportation of any defendant from another district, . . . except that any time consumed in excess of ten days from the date of an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable . . .

Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 21(b, c), provides:

(b) For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding . . . to another district.

> When a transfer is ordered the clerk shall transmit to the clerk of the court which the proceeding is transferred all papers in the proceeding . . . , and the prosecution shall continue in that district.

STATEMENT OF THE CASE

Carlos Duque was arrested in the District of Arizona while in possession of cocaine on August 21, 1992. (App. "A" at 9681-9682, 62 F.3d at 1148). He has remained in custody since that arrest. An indictment for that offense and others was brought against Mr. Duque and numerous co-defendants in the Central District of California. (*Id.*). On October 13, 1992, the last remaining co-defendant appeared with counsel. (CR[1]2, 121). Forty-one days of

[1] "CR" refers to the clerk's record.

time included for Speedy Trial Act purposes unquestionably passed before motions were filed. (*Id.* 155).

Mr. Duque's co-defendants filed a motion to sever one of the counts on the grounds that venue existed only in the District of Arizona. The co-defendants also moved for a change of venue to the District of Arizona on the remaining charges against them pursuant to Rule 21, Federal Rules of Criminal Procedure. (RT[2] 1/20/93, 196; CR2, 197). Although it first opposed the motions, the prosecution ultimately agreed to the transfer.[3] (App. "A" at 9684, 62 F.3d at 1148).

However, the government did not transfer the case. On February 3, 1993, the government obtained a new indictment in the District of Arizona. On the same date, the California district judge ordered that Mr. Duque be transported to face the new indictment. (RT 2/3/93, 11). Nine months passed before, on the government's motion, the California indictment was dismissed. (App. "A" at 8-9, 62 F.3d at 1149).

Mr. Duque was not brought to his first appearance with counsel in Arizona until fifty-four days after the government was ordered to transport him. (*Id.* at 7, 1149). He filed a motion to dismiss under the Speedy Trial Act

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[2] "RT" refers to the reporter's transcript.

[3] The court of appeals' statement that the case was moved to Arizona "chiefly to accommodate the defendants" (App. "A" at 9684), while irrelevant here, is inaccurate. The co-defendants' motion contended that there was no basis for venue of a key charge in California; the move to Arizona was therefore mandated by law if the government wished to pursue that charge. (RT 1/20/93, 160-161).

based on the government's failure to bring him to trial within seventy included days of his first appearance on the original indictment. (*Id.*). The motion was denied without findings by the district court. (CR3, 98).

On appeal, Mr. Duque reasserted the issue. He noted that, because the government voluntarily chose to obtain a new indictment, the Speedy Trial Act clock ran from the first appearance on the original indictment. He further pointed out that, pursuant to 18 U.S.C. § 3161(h)(1)(H), only ten days could be excluded from the time included under the Act for transporting him to the new district. Without dispute, forty one days of included time passed during pretrial proceedings in California. Further, only ten of the fifty four days the government spent transporting Mr. Duque to his initial appearance in Arizona could be excluded. It is therefore clear, Mr. Duque argued, that eighty five days of included time passed without holding a trial, a clear violation of the seventy day limit established by the Act. 18 U.S.C. § 3161(c)(1).

The court of appeals rejected this argument. It first correctly noted that the Speedy Trial Act clock continues to run from the original indictment when a superseding indictment is returned. However, the court then took the unprecedented position that, even though a new indictment was returned without dismissal of the original, the new indictment was not a "superseding" indictment for the purposes of the Act. (App. "A" at 9, 62 F.3d at 1149). The court further found that, even if the speedy trial period started at the time of the original indictment, Mr. Duque could not prevail. The court based this conclusion on the irrelevant observation that the Act's clock is tolled during the time that a case is "transferred". The court

ignored the fact that there was no transfer under Rule 21 of Criminal Procedure, and that therefore the government may exclude only ten days for the transportation of Mr. Duque to the new district under 18 U.S.C. § 3161(h)(1)(H). (*Id.* at 12, 1151 n. 1).

REASONS FOR GRANTING THE WRIT

The Decision of the Ninth Circuit is Contrary to the Decisions of its Sister Circuits and, if not Corrected, Will Result in Capricious Application of the Speedy Trial Act.

The Ninth Circuit panel's published opinion in this case conflicts with the established law in that circuit, the sister circuits, and the plain language of the Speedy Trial Act and the Federal Rules of Criminal Procedure.

Prior to this opinion, all courts agreed that the term "superseding indictment" meant a second indictment returned before the original indictment was dismissed. The Speedy Trial Act was properly interpreted to base the outside time limits for holding trial on the original indictment when the government chose to obtain a new indictment, while basing the limits on the new indictment when the original indictment was dismissed on motion of the accused or for other reasons beyond the government's control. The panel's opinion rejects those decisions, substituting an obscure alternative that will require the district courts to speculate as to whether the seventy day limit for trial is based on the original indictment or the superseding indictment. This result contradicts other Ninth Circuit case law, as well as decisions of the Second,

Fifth, Seventh and Eighth Circuits. It is also contrary to the consistent and equitable application of the Speedy Trial Act.

In addition, the challenged opinion confuses a dismissal and reindictment in a new district with the transfer of a case pursuant to Rule 21, Federal Rules of Criminal Procedure. As a result, the opinion applies the incorrect excludable delay provision under the Speedy Trial Act. The conclusion is inconsistent with the plain language of the rule and statute, is contrary to case law in the Fifth and Sixth Circuits, and will further contribute to an inconsistent and inequitable application of the Speedy Trial Act.

I. The Decision Creates Confusion as to the Right to a Speedy Trial in all Cases in which a Superseding Indictment is Returned.

In enacting the Speedy Trial Act, Congress specifically anticipated the issues likely to arise in cases in which an indictment is dismissed but later refiled. When such a "reindictment" is filed, the Act wisely places the onus on the party that moved for the dismissal of the original indictment. 18 U.S.C. § 3161(h)(6). If the dismissal comes at the government's request, the accused should not be deprived of the right to be tried within seventy days of the initial appearance; the time must run based on the original indictment. However, if dismissal comes at the defendant's behest, the government should not be prejudiced; the clock should be based on the subsequent indictment. 18 U.S.C. § 3161(d)(1). As Justice

Blackmun pointed out, "The difference in treatment protects against governmental circumvention of the speedy trial guarantee." *United States v. Rojas-Contreras*, 474 U.S. 231, 239 (1985) (Blackmun J., concurring).

The Act does not specifically address the circumstance in which the government obtains a "superseding indictment". As Justice Blackmun also clearly stated, "The term 'superseding indictment' refers to a second indictment issued in the absence of dismissal of the first." *Id.* at 237. Where the government chooses to obtain a new indictment based on the same allegations, there is no sound reason to treat the case any differently depending on the whim of the government as to whether it dismisses the original indictment before or after obtaining the new one. If the government chooses to amend the charges, the defendant's right to a speedy trial should not be prejudiced. This conclusion is not only consistent with the design of the Speedy Trial Act and the interests of justice, it is also a rule that can be easily and consistently administered by the nation's trial courts.

It is therefore not surprising that, with the exception of the present case, all reported appellate decisions accept and apply the rule described in the foregoing paragraphs. That is, when the government chooses to obtain a superseding indictment, the parties are placed in the same position as they are when the government chooses to obtain a reindictment – the speedy trial clock runs from the original indictment. *United States v. Gambino*, 49 F.3d 353, 362 (2d Cir. 1995); *United States v. Baker*, 40 F.3d 154, 159 (7th Cir. 1994); *United States v. Palomba*, 32 F.2d 1456, 1462 (9th Cir. 1995); *United States v. Long*, 900 F.2d 1270,

1275 (8th Cir. 1990); *United States v. Gonzalez*, 897 F.2d 1312, 1316 (5th Cir. 1990).

In the case at bar, however, the court of appeals followed a path that can bring only arbitrariness and injustice. It rejected the foregoing clear definition of "superseding indictment", and stated, "The fact that the [original] California indictment survived for a time beyond the [subsequent] Arizona indictment does not automatically transform the latter into a superseding indictment." (App. "A" at 9, 62 F.3d at 1149). However, the court did not replace the existing definition with a new standard, thus leaving it up to the trial courts to guess as to when to start the speedy trial clock in cases in which a new indictment is returned in the absence of dismissal of the original indictment.

The court of appeals decision is therefore not only incorrect, it will lead to chaotic application of the Speedy Trial Act. In light of the great importance of the Act in enforcing one of the most fundamental rights guaranteed by the Constitution, as well as the unlimited factual situations to which it must be applied, it is submitted that this Court must grant the writ and correct the error of the court of appeals.

II. The Decision Creates Confusion as to the Right to a Speedy Trial in all Cases in which an Indictment is Dismissed and Refiled in a Different District.

Congress clearly distinguished the manner in which the Speedy Trial Act would apply in situations in which a case is transferred from one district to another, as opposed to circumstances in which only a defendant is

transported to the district in which a case is pending. In fact, these contrasting scenarios are addressed in consecutive subsections of the Act. When a case is transferred "from another district under the Federal Rules of Criminal Procedure," all of the time necessary to complete the transfer is excluded from the speedy trial calculation; when a defendant is merely transported to the district in which the indictment is filed, any delay in excess of ten days is presumed to be unreasonable. Compare 18 U.S.C. § 3161(h)(1)(G) with § 3161(h)(1)(H).

In the present case, the government could have transferred the case pursuant to the Rules of Criminal Procedure, specifically Rule 21. However, the government chose not to do so, instead bringing a new indictment in Arizona and transporting Mr. Duque to the new district. This being the government's choice, the Act specifies that any delay in excess of ten days is presumed to be unreasonable. Ignoring this plain language, and the equally plain record, the court opined that the case was transferred. (App. "A" at 12, 62 F.3d at 1151 n. 1).

In interpreting the Act, this Court has recognized the importance of giving meaning to the statute's "plain language". *United States v. Rojas-Contreras*, 474 U.S. at 237. In the present case, the court of appeals failed to follow a clear and easily applied standard, and compounded this error by failing to replace that standard with any standard at all. Should this decision be left uncorrected, inconsistent application of the laws giving effect to a critical constitutional right will follow. This Court must act to ensure that the lower tribunals properly and uniformly enforce the right to a speedy trial for all parties.

CONCLUSION

In conclusion, petitioner requests that this Court grant certiorari since the Speedy Trial Act questions presented herein are compelling, and the conflict created among the circuits created by the panel's opinion is significant, and needs to be resolved in order to promote uniformity in the application of the Act. The panel's opinion has decided an important question of federal law which should be settled by this Court.

Respectfully submitted this 10th day of June, 1996.

SEAN HOLAHAN BRUNER
Attorney for Petitioner
Carlos Antonio Duque

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 94-10259
Plaintiff-Appellee,	D.C. No. CR-93-041-TUC-JMR
V.	
CARLOS ANTONIO DUQUE,	
Defendant-Appellant.	OPINION

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
May 12, 1995 – San Francisco, California

Filed August 7, 1995

Before: Walter J. Cummings,* Mary M. Schroeder and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Cummings

SUMMARY

Criminal Law & Procedure/Speedy Trial

The court of appeals affirmed a district court judgment of conviction and sentence. The court held that the

*Honorable Walter J. Cummings, United States Circuit Judge for the Seventh Circuit, Sitting by designation.

temporary survival of an indictment following a change of venue to accommodate the defendant does not transform a subsequent indictment into a superseding indictment that retains the original indictment's Speedy Trial Act clock.

After his indictment for drug offenses, appellant Carlos Duque's first represented appearance was in the Central District of California in Los Angeles. Defense counsel for several codefendants moved for a transfer of the entire case to the District of Arizona. After initial government opposition, all parties agreed to the transfer. After warning the defendants that a change of venue to Arizona could entail significant delay, the district court transferred the case, but did not dismiss the indictment.

Duque was again indicted in the District of Arizona and appeared with counsel on March 29, 1993. The original California indictment was dismissed on November 5; Duque went to trial on January 25, 1994.

A government witness testified regarding the movement of cocaine from Latin America into the United States and the methodologies of large-scale narcotics importers. It appeared that federal agents had moved the drugs underlying the indictment through Mexico into Arizona as part of a "reverse sting" sale of narcotics to the defendants. The evidence also showed that after Duque was advised of his rights, a government agent asked if he wanted to "talk to us," and that Duque then made inculpatory statements. Duque was convicted and received a life sentence.

On appeal, Duque contended that because the California district court did not dismiss the original indictment until November 5, 1993, after the Arizona indictment issued, the latter had to be deemed a superseding indictment that retained the original Speedy Trial Act clock of 70 days from the date of his first represented appearance in California district court.

Duque also contended that the trial court erred in admitting generic testimony regarding commerce in drugs. He also asserted that the government acted outrageously in causing controlled substances to be moved through Mexico without the knowledge of its law-enforcement authorities. Duque also claimed that the statements he made to the arresting officers were inadmissible because he was not asked to waive his *Miranda* rights, and that they coerced him by asking him whether he wanted to "cooperate". Lastly, Duque contended that his life sentence violated due process because the relevant base offense level existed for only a relatively small period of time, and because it constituted cruel and unusual punishment.

Under the Speedy Trial Act, a defendant must be brought to trial within 70 days from the date of the indictment or from the date the defendant has appeared, whichever last occurs. The fact that the California indictment survived for a time beyond the Arizona indictment did not automatically transform the latter into a superseding indictment. The Arizona indictment resulted from a motion by Duque's codefendants and acceded to by him. It was intended chiefly to accommodate the defendants, and not, like a superseding indictment, to clarify or remedy defects in the existing charge. It was properly

viewed as a re-indictment even though it preceded dismissal of the previous indictment by months.

The identity of the author of the motion for dismissal is paramount in determining whether the clock should be restarted or merely tolled. Unfortunately for Duque, whether the clock was restarted or tolled in his case did not alter the outcome. If the Arizona indictment were viewed as restarting the clock, his claim, which depended on the inclusion of non-excludable days from California, was eviscerated. If the non-excludable days from California were counted but the period between the motion for change of venue and the first appearance in Arizona were tolled, Duque fared no better. Tolling the time between February 3, when the California court ordered the change of venue, and March 29, when Duque made his first appearance, left 64 non-excludable days. The delay did not violate the letter or spirit of the Speedy Trial Act.

Much of the testimony regarding the movement of cocaine from Latin America into the United States and the methodologies of large-scale narcotics importers was of dubious relevance. However, given the overwhelming evidence against Duque – he was caught red-handed on videotape – any error was harmless.

The mere fact of government involvement in a crime does not support a finding of outrageous conduct. Duque had no standing to raise an argument regarding Mexico's sovereignty.

Duque was advised of his rights, asked if he wanted to talk to the agents, and proceeded to speak. This was a clear indication of waiver and, even assuming the agent's

question suggested to Duque that he might benefit from early disclosure, it fell far short of coercion.

Ninth Circuit caselaw foreclosed Duque's challenges to his life sentence. The fact that the Sentencing Guidelines' base offense level for drug offenses existed during a relatively small window of time did not violate due process, given that district courts must apply the Guidelines in effect on the date of sentencing. Duque cited no caselaw supporting the proposition that a life sentence for possession of thousands of pounds of cocaine is constitutionally defective.

COUNSEL

Sean Bruner, Bruner & Bowman, Tucson, Arizona for the defendant-appellant

Ann E. Mosher, Assistant United States Attorney, Tucson, Arizona, for the plaintiff-appellee.

OPINION

CUMMINGS, Circuit Judge:

After being arrested in Arizona, indicted in California and subsequently re-indicted in Arizona, Carlos Antonio Duque was tried and convicted of possession with intent to distribute cocaine and conspiracy to do the same, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Duque was arrested while unloading cocaine from a truck that had been driven from Mexico to the United States at the behest of an individual working with federal drug agents.

Duque now appeals his conviction on numerous grounds, including the contention that the delay between his original California indictment and his eventual trial in the District of Arizona violated the Speedy Trial Act. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

BACKGROUND

This case involves a large conspiracy to import substantial amounts of cocaine from Mexico to the United States. Government agents became aware of Duque's involvement in the conspiracy in the summer of 1992, and subsequently obtained a warrant to monitor his telephone calls. In the meantime, a confidential informant working under the supervision of federal agents set up a deal with members of the conspiracy to purchase cocaine. The deal transpired on August 20, 1992, when an individual hired by the informant drove a trailer containing concealed cocaine from Mexico into Arizona. Once the truck reached Arizona, other individuals drove it to a yard belonging to the informant.

The following day Duque arrived and, along with several others, began unloading the concealed cocaine into his truck. Surveilling agents, who were videotaping the events as they occurred, arrested Duque and, after reading him his *Miranda* rights in Spanish, asked the defendant if he was "of a mind to talk to [the agents]." Duque subsequently made several inculpatory statements.

Police had also obtained a search warrant for what they believed to be Duque's residence in Tucson. Pursuant to that warrant, in addition to searching the house,

agents searched a motor home and a car found on the premises, and there recovered additional cocaine along with cash and drug packaging materials.

Duque and a number of alleged co-conspirators were indicted in Los Angeles on September 8, 1992, and Duque made his first represented appearance on that indictment on September 16, 1992. On December 21, 1992, after a number of preliminary motions had been ruled on, defense counsel for several of Duque's co-conspirators moved to transfer the entire case to the federal district court for the District of Arizona. Government prosecutors initially opposed the motion to transfer but eventually acceded. On February 3, 1993, with the consent of all the defendants including Duque, the California judge transferred the case to the District of Arizona. Instead of merely ordering the transfer, however, the district judge decided to dismiss the California indictment so that the government could re-indict the defendants in Arizona.

Duque was indicted in Arizona on February 3, 1993, the same date that the California district judge approved the transfer, and made his first represented appearance on March 29, 1993. The original California indictment was dismissed on November 5, 1993, and Duque went to trial in the District of Arizona on January 25, 1994.

During voir dire of the jury, Duque requested dismissal for cause of a panel member who expressed strong feelings against drug sellers. The district judge denied this request, and Duque exercised a peremptory strike to remove the panel member.

Duque was convicted and sentenced to life in prison, based on the district judge's base calculation of 42 with a

two-point increase for obstruction of justice (an apparent attempt to orchestrate an escape), a three-point increase for his role in the offense, and a two-point decrease for acceptance of responsibility.

DISCUSSION

Of Duque's numerous claims on appeal, only one merits extended discussion.

I. *Speedy Trial Act*

Under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, a defendant must be brought to trial "within seventy days from the filing date. . . of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever last occurs." 18 U.S.C. § 3161(c)(1). The statute provides for numerous exclusions from the computation of the 70-day period, including, *inter alia*, time designated for transport of defendants and for the preparation and hearing of motions. The exclusions apply to all co-defendants in a case. *United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir.), *cert. denied*, 114 S. Ct. 250 (1993).

The appellate court reviews for clear error a district court's findings concerning speedy trial violations. *Id.* 1380. Questions of law concerning the application of the Act are reviewed *de novo*. *United States v. Wickham*, 30 F.3d 1252, 1253 (9th Cir. 1994).

Duque argues that the Speedy Trial Act clock began ticking on the date he and his co-defendants made their initial California appearance and expired well in advance

of his Arizona trial. He contends that because the California district judge did not dismiss the original indictment until November 5, 1993, well after the Arizona indictment had issued, the latter should be viewed as a superseding indictment which retains the original Speedy Trial Act clock, *See United States v. Rojas-Contreras*, 474 U.S. 231, 234 (1985) (superseding indictment does not provide new period for trial preparation); *United States v. Clymer*, 25 F.3d 824, 827 n.2 (9th Cir. 1994) (when a superseding indictment contains charges which must be joined with the original charges, Speedy Trial Act calculations begin from the date of the original indictment); *United States v. Karsseboom*, 881 F.2d 604, 606-07 (9th Cir. 1989) (where trial court dismisses some counts and defendant subsequently reindicted for same conduct, both retained counts and new indictment inherit original clock).

The fact that the California indictment survived for a time beyond the Arizona indictment does not automatically transform the latter into a superseding indictment. Although Duque attempts to pin both blame and nefarious motives for the second indictment on the government, the Arizona indictment resulted from a motion made by several of Duque's co-defendants and eventually acceded to by him. The California trial judge warned them prior to granting their motion for a change of venue, which the government initially opposed, that "If you go to Arizona, you may not go to trial for several weeks or months." The defendants continued to press their motion and eventually prevailed; the judge informed the defendants that "What is being proposed here in furtherance of your attorneys' request that this matter be transferred to Arizona is that the government is

going to dismiss the charges here." Although the chronology of the various indictments and dismissals is somewhat confusing, it is clear that the Arizona indictment was intended chiefly to accommodate the defendants and not, like a superseding indictment, to clarify or remedy defects in the existing charge. Thus it is most properly viewed as a re-indictment, despite the fact that it preceded dismissal of the previous indictment by some months.

The Speedy Trial Act provides two textual guides to aid in the determination of how the time is to be calculated between indictment and re-indictment:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped . . . and thereafter. . . an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct. . . [the Speedy Trial Act clock starts fresh].

18 U.S.C. § 3161(d)(1); *see also United States v. McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983) (when indictment is dismissed on defense motion, "any subsequent step toward prosecution causes the time period to begin running anew."). If the indictment is dismissed at the government's behest, on the other hand,

> and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would

> commence to run as to the subsequent charge had there been no previous charge [is tolled].

18 U.S.C. 3161(h)(1); *see also United States v. Feldman*, 788 F.2d 544, 548 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

The text of the statute, as well as Ninth Circuit case law, thus suggest that the identity of the author of the motion for dismissal is paramount in determining whether the clock should be restarted or merely tolled. *See Feldman*, 788 F.2d at 549 (noting that 18 U.S.C. § 3161(d)(1) may apply "to any manner of dismissal of an indictment except on the government's own motion," and should apply where the defendant rather than the government benefits from the dismissal); *see also McCown*, 711 F.2d at 1446. Analysis of this particular case is complicated by the fact that neither the government nor the defendants bore clear responsibility for the reindictment. The defendants moved to transfer venue pursuant to Fed. R. Crim. P. 21(b), which allows for such action but does not require dismissal and re-indictment. These latter steps apparently came at the government's behest, as part of their agreement to transfer. But the defendants also requested and received severance, a step which once taken required the government to re-indict.

Unfortunately for Duque, however, whether the clock was restarted or merely tolled in his case does not alter the outcome. If the Arizona indictment is viewed as restarting the clock, his claim, which depends on inclusion of non-excludable days from California, is eviscerated. If the non-excludable days from California are counted but the period between the motion for change of

venue and the first appearance in Arizona is tolled,[1] Duque fares no better. He concedes that at most 105 non-excludable days elapsed before his motion to dismiss on June 28, 1993.[2] (His brief referenced three days that accrued after the motion to dismiss, but under *United States v. Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989), these days are not counted.) Tolling the time between February 3, when the California district court ordered the change of venue, and March 29, when Duque and his co-defendants made their first appearance, leave 64 non-excludable days.[3] Such a delay does not violate the Speedy Trial Act in letter or spirit. Thus we need not decide whether under the particular circumstances of this case the reindictment restarts or merely tolls the Speedy Trial clock; either way, Duque's challenge falls short.

II. *Remaining Claims*

The remainder of Duque's claims can be addressed briefly.

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[1] See 18 U.S.C. § 3161(h)(1)(G) (excluding any period of delay "resulting from any proceeding relating to the transfer of a case . . . under the Federal Rules of Criminal Procedure.").

[2] Duque actually argues that we should exclude the time expended in originally bringing the co-defendants to California, but we decline to do so and will instead consider his lower baseline of 105 days. *See United States v. Calabrese*, 825 F.2d 1342, 1347 (9th Cir. 1987).

[3] If the reindictment is deemed to restart the clock, Duque does not argue that there was a Speedy Trial Act violation.

A. *Admission of Expert Testimony*

Duque argues that the testimony of Aaron Graham, a self-described college law enforcement instructor and former Drug Enforcement Administration agent, was irrelevant and prejudicial. Graham testified regarding the movement of cocaine from Latin America into the United States and the methodologies of large-scale narcotics importers. Much of this testimony, it is true, was of dubious relevance to the case at hand, which involved a fairly straightforward conspiracy. However, given the overwhelming evidence against Duque – he was quite literally caught red-handed on a videotape – any error was harmless.

B. *Outrageous Government Conduct*

Duque contends that the government acted in an outrageous manner in causing controlled substances to be transported through Mexico without the knowledge and participation of Mexican law enforcement officials. *See United States v. Citro*, 842 F.2d 1149, 1152 (9th Cir.) (investigation that is "so grossly shocking and so outrageous as to violate the universal sense of justice" may violate due process), *cert. denied*, 488 U.S. 866 (1988). The mere fact of government involvement in a crime does not support a finding of outrageous conduct. *See Hampton v. United States*, 425 U.S. 484, 489-90 (1976) (government's conduct in supplying contraband for use in investigation was not outrageous). Duque attempts to bolster his challenge by pointing to the fact that the cocaine was moved across the border from Mexico into Arizona without the knowledge of Mexican government officials. However, he has no

standing to raise an argument regarding Mexico's sovereignty. *See United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987).

C. *Admission of Wiretap Evidence*

Duque challenges the admission of wiretap evidence on the ground that the supporting affidavit omitted questions about the informant's credibility. Duque did not make a sufficient preliminary showing to obtain a hearing regarding this allegation. In any event, a redacted affidavit still would have supported probable cause. *See United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.), *cert. denied*, 449 U.S. 824 (1980).

Duque also contends that the government failed to demonstrate the necessity of wiretapping, but we have approved the use of wiretaps in like circumstances and see no reason to depart from our precedents in this case. *See, e.g., United States v. Torres*, 908 F.2d 1417, 1422 (9th Cir.), *cert. denied*, 498 U.S. 948 (1990); *United States v. Carneiro*, 861 F.2d 1171, 1177 (9th Cir. 1988).

D. *Admission of Evidence Seized Pursuant to Search Warrant*

Duque argues that agents exceeded the scope of the warrant for the Tucson residence by searching vehicles on the premises. Although search warrants ideally state their full scope with particularity, "a search warrant authorizing a search of a particularly described premises may permit the search of vehicles owned or controlled by the owner of, and found on, the premises." *United States v.*

Percival, 756 F.2d 600, 612 (7th Cir. 1985) (so holding and collecting cases); *see also United States v. Reivich*, 793 F.2d 957, 963 (8th Cir. 1986) (citing *Percival* with approval).

E. *Admission of Post-Arrest Statements*

Duque challenges the admission of statements he made to arresting officers on the basis that the arresting agent did not ask if he wished to waive his *Miranda* rights and coerced him by asking him, more or less, whether he wished to "cooperate." Both claims lack merit. Duque was advised of his rights, asked, "Are you of a mind to talk to us?" and proceeded to speak. This is a clear indication of waiver and, even assuming the agent's question suggested to Duque that he might benefit from early disclosure, it falls far short of coercion. *See United States v. Guerrero*, 847 F.2d 1363, 1365-67 (9th Cir. 1988); *Hutto v. Ross*, 429 U.S. 28, 30 (1986).

F. *Refusal to Strike Juror for Cause*

The trial court's refusal to strike for cause a venire member who initially demonstrated some hesitation about his ability to evaluate the case neutrally is harmless even if erroneous (since Duque eventually used a peremptory strike to remove the venire member) unless Duque can demonstrate a separate constitutional violation. He cannot, and his claim fails. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."); *United States*

v. Baker, 10 F.3d 1374, 1404 (9th Cir. 1993) (same), *cert. denied*, 115 S.Ct. 330 (1994).

G. *Calculation of Offense Level and Upward Adjustment*

In sentencing Duque, the district judge took into account amounts of cocaine seized on two prior occasions for which no charges were brought under the Arizona indictment. This is proper under the Guidelines, which authorize a district court to consider other instances of uncharged criminal behavior where these constitute "relevant conduct." *United States v. Fine*, 975 F.2d 596, 600 (9th Cir. 1992). Moreover, Ninth Circuit case law has specifically approved the use of previously dismissed charges in calculating a defendant's base offense level. *See id.*

Duque also challenges the upward adjustment for obstruction of justice, based on his attempted escape, as factually erroneous, but this argument is untenable given the raft of evidence introduced by the government. *See United States v. Ancheta*, 38 F.3d 1114, 1118 (9th Cir. 1994) (once judge makes a factual finding that defendant obstructed justice, upward departure is mandatory).

H. *Eighth Amendment and Due Process Claims*

Ninth Circuit case law foreclosed Duque's Eighth Amendment and due process challenges to his life sentence. The fact that the Sentencing Guidelines' base offense level of 42 for drug offenses existed only during a relatively small window of time does not violate due

process, given that district courts must apply the Sentencing Guidelines in effect on the date of sentencing. 18 U.S.C. § 3553(a)(4); *United States v. Robinson*, 958 F.2d 268, 272 (9th Cir. 1992). As for his Eighth Amendment claim, Duque cites no case law in support of the proposition that a life sentence for possession of thousands of pounds of cocaine is constitutionally defective. Instead, he concedes the existence of both Ninth Circuit and Supreme Court cases holding just the opposite. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1991) (life sentence for possession of 1.5 pounds of cocaine); *United States v. Van Winrow*, 951 F.2d 1069 (9th Cir. 1991) (life sentence for possession of 150 grams of cocaine with intent to distribute).

CONCLUSION

For the above-stated reasons, Duque's conviction and sentence are AFFIRMED.